IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 10TH DECEMBER 2007 / 19TH AGRAHAYANA 1929

SA.No. 783 of 1994()

AS.196/1993 of DISTRICT COURT, THALASSERY
OS.135/1988 of SUB COURT,THALASSERY

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APPELLANTS:APPELLANTS:PLAINTIFFS:

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1. **VILLAN KRISHNAN, S/O.KUNHIRAMAN, SIVAPURAM AMSOM, MALOOR DESOM, TELLICHERRY.**
2. **VILLAN PANCHALI, ...DO...DO...**
3. **VILLAN GOVINDAN, ...DO..DO....**
4. **VILLAN JANAKI, ...DO..DO.....**
5. **ANIYERI MADHAVI, D/O.KUNHAMBU, THOLAMBRA AMSOM DESOM, TELLICHERRY.**
6. **ANIYERI JANARDHANAN, ..DO..DO....**
7. **ANIYERI CHANDRAN, ...DO...DO.....**
8. **ANIYERI PADMINI, ...DO....DO.....**
9. **ANIYERI PREMAN, ...DO...DO.....**
10. **CHATHOTH NARAYANI, D/O.KUMARAN, KEEZHUR DESOM, PUNNAD DESOM, TELLICHERRY.**
11. **CHATHOTH RAMESHAN, ...DO...DO....**
12. **CHATHOTH RAJEEVAN, ...DO...DO.....**

BY ADV. SRI.K.I.MAYANKUTTY MATHER
SRI.R.RAJESH
SRI.JIJIMOL J.VADAKKEN

S.A.NO.783/1994

RESPONDENTS: RESPONDENTS/DEFENDANTS 2 TO 7 & 9:

***1. KATTAN AMMINI, W/O.MANAPPATTI CHATHU, THOLAMBRA AMSOM, PANAMBATTA DESOM, TELLICHERRY. (D I E D)**

2. KATTAN MATHU, ...DO...DO...DO....

****3. KATTAN KUMARAN, ..DO...DO....DO... (D I E D) RECORDED AND LRS IMPLEADED:**

**** DEATH OF THE 3RD RESPONDENT IS RECORDED VIDE ORDER DATED 06/12/06 IN MEMO CF NO.6014/06.**

4. KATTAN JANAKI, ...DO..DO....

5. KATTAN KALLU, ...DO...DO.....

6. KATTAN CHERIYA KUNHAMBU, ...DO...DO....

7. KATTAN MANOHARAN, ..DO...DO....

*** RESPONDENTS 2 TO 7 WHO ARE ALREADY ON THE PARTY ARRAY ARE RECORDED AS THE LEGAL REPRESENTATIVES OF THE DECEASED 1ST RESPONDENT AS PER ORDER DTD. 17/11/95 ON MEMO DTD. 7/10/95.**

***** 8 TO 14 IMPLEADED AS LRS OF R3:**

***** ADDL.RESPONDENTS 8 TO 14:**

R8. MANAPPATI MATHU, W/O.KUMARAN, THOLAMBRA AMSOM, PANAMBATTA DESOM, TELLICHERRY.

R9. SURENDRAN, S/O.LATE KUMARAN, THOLAMBRA AMSOM, ...DO...D....

R10. SHOBHA, D/O.LATE KUMARAN, ...DO...DO....

R11. ASOKAN, S/O.LATE KUMARAN, ...DO...DO.....

**R12. CHANDRI, D/O.LATE KUMARAN,
THOLAMBRA AMSOM, PANAMBATTA DESOM,
TELLICHERRY.**

R13. LATHA, D/O.LATE KUMARAN, ...DO....DO.....

R14. PRASAD, S/O. LATE KUMARAN, ...DO...DO.....

*****ADDL.RESPONDENTS 8 TO 14 IMPLEADED AS THE LRS OF DECEASED 3RD RESPONDENT VIDE ORDER DTD. 13/11/2007 IN I.A.NO.2686/06.**

R2 & R4 TO R7 & R8 TO R14 BY ADV. SRI.R.PARTHASARATHY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 10/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 783 OF 1994

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Dated this the 10th day of December, 2007

JUDGMENT

Whether findings in a former suit for injunction on the question of title will operate as bar of res judicata in a subsequent suit for recovery of possession is the crucial question. Plaintiffs in O.S.135/1988 before Sub Court, Thalassery are the appellants. Defendants are the respondents. Suit was filed for recovery of possession of two items of plaint schedule properties. Plaint schedule properties are in resurvey No.45/2 part, 44/2(a) part and 53/1 part of Tholambra Village of Thalassery Taluk. Item No.1 is having 40 cents and item No.2 is plots B, B1,B2, A,A1,A2 A3 and A4 as marked in Ext.C9 plan in O.S.No.98/1974 the former suit on the file of Munsiff Court, Kuthuparamba. Item No.1 originally belonged to Panambatta devaswom and item No.2 to Mundayodan tharwad on jenm right. According to

appellants, item No.1 of the plaint schedule property was obtained from them Narayanan Namboodiri then Ooralan of the Devaswom under an oral lease by Chokiyodan Kunhiraman on 4.9.1930 and since then Kunhiraman has been in possession of the property and item No.2 was obtained by the said Kunhiraman as per an oral lease from the tarwad on 14.4.1924 and he has been in possession of the property and on the death of Kunhiraman it devolved on the appellants and they purchased jenm right from the Land Tribunal evidenced by Ext.A1 purchase certificate in respect of item No.1 and Ext.A42 purchase certificate in respect of item No.2 of the plaint schedule property. It is admitted case that originally Kunhiraman instituted O.S.95/1974 and O.S.98/1974 seeking a decree for permanent prohibitory injunction against deceased first defendant and on the death of Kunhiraman appellants got themselves impleaded as his legal heir. Under Ext.A1 judgment dated 20.6.1978 those suits were dismissed. Appellants

challenged the judgment before Sub Court, Thalassery in A.S.148/1978 and A.S.150/1978. Under Ext.A2 judgment dated 6.3.1979 appeals were allowed and a decree for injunction was granted in favour of appellants in both the suits, that judgment was challenged before this court in S.A.419/1979 and S.A.430/1979. Under Ext.A3 judgment dated 21.5.1985 this court allowed the appeals and set aside Ext. A2 judgment and restored Ext.A1 judgment of the trial court. It is thereafter present suit was filed seeking recovery possession of the same plaint schedule properties on the strength of title. Respondents resisted the suit contending that suit is barred by res judicata in view of Ext.A1 judgment in O.S.95/1974 and O.S.98/1974 as confirmed in Ext.A3 judgment of this court. Respondents also reiterated the contentions raised in the earlier suits that plaint schedule properties were not obtained on lease by Kunhiraman. It was contended that the properties were obtained by deceased first

defendant Chathu from Kunhambu, the karanavan of Mundayodan tharwad at about 65 years back agreeing to pay 140 seers of paddy and he was in possession of the same and while Chathu was in possession of the property Chockiyodan Kunhiraman the predecessor in interest of appellants also assisted him in effecting improvements. It was further contended that since Damodaran Namboodiri, the karanavan of Arigottillam claimed jenm right over 25 cents in the possession of Chathu, he entered into a lease arrangement with Damodaran Namboodiri in respect of 25 cents of land and appellants or his predecessor in interest have no right over the plaint schedule properties. It was also contended that there is no distinct boundary to separate the plaint schedule properties from the remaining properties of first respondent and appellants are not entitled to the decree sought for.

2. Learned Sub Judge referred the question of tenancy to the Land Tribunal. Land Tribunal rendered a finding that appellants are cultivating

tenants in respect of plaint schedule properties. The trial court, as is bound to accepted the findings of the Land Tribunal. But it was found that question of title was decided in O.S.95/1974 and O.S.98/1974. Following the decision of this court in **Cheru v. Choyikutty (1988(2) K.L.T.727)** it was held that though the earlier suits were only for injunction as there was an issue on the question of title and court fee was also paid under section 27(a) of Kerala Court Fees and Suit Valuation Act, findings on title operate as bar of res judicata and held that appellants are not entitled to claim title to the plaint schedule properties and dismissed the suit. Appellants challenged the judgment before District Court, Thalassery in A.S.196/1993. Learned District Judge on reappreciation of evidence accepted the findings of trial court that the suit is barred by res judicata in view of Exts.A1 and A3 judgment in the former suits. First appellate court relied on the decision of a learned single Judge of this court in

Kumaran v. Raman (1994(1) KLT 434) and found that as the question of title cannot be reagitated, suit should not have been referred to the Land Tribunal and the finding of Land Tribunal is to be ignored. The appeal was dismissed. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

> 1. Whether courts below were justified in dismissing the suit for recovery of possession on the strength of title on the ground of res judicata especially when the former suits were only for injunction simpliciter where an issue regarding title was not directly and substantially in issue.
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> 2. Whether a finding regarding question of title in a suit for injunction will constitute res

judicata in a subsequent suit?

3. Can a reference to the Land Tribunal and a finding thereof under section 125(3) of the Kerala Land Reforms Act can be challenged by a party as unnecessary, when at his instance the matter was referred to the Land Tribunal.

4. Learned counsel appearing for appellants and respondents were heard.

5. The argument of learned counsel appearing for appellants is that in a suit for injunction the only question to be decided is question of possession of plaint schedule property and question of title was not to be decided and even if there is any finding on the question of title, it can either be incidental or collateral and therefore that finding on the question of title will not operate as res judicata in a later suit for recovery of possession. Learned counsel

relied on the decision of Apex Court in **Gram Panchayat, Naulakha v. Ujagar Singh (AIR 2000 SC 3272),** where relying on the earlier decision in **Sajjadanashin Sayed Md.B.E.Edr. v. Musa Dadabhai Ummer (AIR 2000 SC 1238)** it was held that if the finding in the former suit is only an incidental finding, it will not be binding in a latter suit or proceeding where title is directly in question unless it is established that it was necessary in the earlier suit to decide the question, of title for granting or refusing injunction. It was aruged by the learned counsel that irrespective of the question of title the plaintiffs in the earlier suit could succeed on establishing possession,and are entitled to a decree for injunction in that case and question of title therefore arise only incidentally for consideration and so the decision on title will not operate as res judicata. Learned counsel relying on Ext.A2 judgment of the first appellate court in the former suits argued that the said

decision was based only on the question of possession and relying on Ext.A3 judgment of this court setting aside Ext.A2 judgment it was argued that question of title was also not directly decided and therefore finding of courts below that claim for title raised by appellants is barred by res judicata in view of Ext.A1 and A3 judgment is not legally sustainable.

6. Learned counsel appearing for respondents relied on the Division Bench decision of this court in **Cheru's case (supra)**and argued that as held by the Division Bench when an issue on title was framed in the earlier suit for injunction and a decision was rendered on that issue and in the former suit court fee was also paid under section 27(a) of Kerala Court Fees and Suit Valuation Act, decision on the question of title in the former suit will operate as bar of res judicata to a subsequent suit and therefore findings of courts below are correct.

7. Ext.A1 to A3 judgments of trial court,

first appellate court and this court in the former suits O.S.95/1974 and O.S.98/1974 establish that an issue on title was specifically framed in both the suits. The trial court considered the question of title in paragraph 22 of Ext.A1 judgment and found that appellants have failed to establish their title in respect of plaint schedule property in O.S.98/1974. In paragraph 23 it was found that plaintiffs in O.S.95/1974 also failed to establish title to the property. Though under Ext.A2 judgment first appellate court considered the question of possession and set aside the finding of trial court, under Ext.A3 judgment, this court set aside Ext.A2 judgment and restored the findings of learned Munsiff in Ext.A1 judgment. Therefore as rightly found by courts below, in the former suits issue on the title was raised and agitated and question of title was also decided against the appellants. Though the said suits were only for injunction, the issue on title was answered against the plaintiffs. The

crucial question is whether that finding will operate as res judicata.

8. Division Bench of this court in Cheru's case following the decision of the Apex Court in **Raj Lakshmi Dasi v. Banamali Sen (AIR 1953 SC 33) and Gangappa v. Rachawwa (AIR 1971 SC 442)** held that where parties without protest went to trial on all the issues, including the issue relating to title and decision was rendered on that issue, though the former suit was only one for injunction the subsequent suit for recovery of possession on the strength of title is barred by res judicata and it is more so when in the suit for injunction court fee was paid under section 27(a) of Kerala Court Fees and Suit Valuation Act.

9. Apex Court in **Sajjadanashin Sayed's case (supra)** elaborately considered the applicability of bar of res judicata in view of the incidental finding in the former suit. After analysing the former decisions including the decision in **Sulochana Amma v. Narayanan Nair (AIR 1994 SC 152)**

it was held that the question whether principles of res judicata will operate or not depends on the facts of each case and whether the finding as to title was treated necessary for granting injunction in the earlier suit. It was held that if the finding was only incidental or collateral, the finding will not operate as res judicata and if not, it will operate as res judicata. Sulochana Amma's case (supra) was an identical case. There former suit was one for injunction. An issue on title was raised. The question was whether finding on the question of title in the former suit will operate as bar of res judicata . The position was settled as follows:-

> "It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit

between the parties. When the same issue is put in issue in a later suit based on the title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata. In this case, when the right and interest of the respondent were questioned in his suit against 'K', the validity of the settlement deed and the terms thereof were gone into. The civil court found that 'K' acquired life estate under the settlement deed executed by his wife conferring vested

remainder in the respondent andon its basis the respondent was declared entitled to an injunction against 'K' who was prohibited not only from committing acts of waste but also from alienating the properties in favour of third parties. The later suit of injunction to which the appellant was a party also binds the appellant. Therefore, even the decree founded on equitable relief in which the issue was directly and substantially in issue and decided, and attained finality would operate as res judicata in a

subsequent suit based on title where the same issue directly and substantilly arises between the parties. The appellant is a person deriving title from 'K' who was a party in the former suit is also hit by the doctrine of lis pendens under section 52 of the Transfer of Property Act."

10. In **Gram Panchayat of Village Naulakha v. Ujagar Singh's case (AIR 2000 SC 3272)** relying on **Sajjadanashin Sayed v. Musa Dadabhai Ummer (AIR 2000 SC 1238)** held:-

"We may also add one other important reason which frequently arises under section 11 CPC. The earlier suit by the respondent against the

Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed v. Musa Dadabhai Ummer (2000) 3 SCC 350):(2000 AIR SCW 901): AIR 2000 SC 1238) where this court, on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not

> be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case."

In Sajjadanashin Sayed's case applicability of res judicata in view of an earlier decision on a collateral and incidental issue was analysed in the light of case law. It was held that a

collateral or incidental issue is ancillary to a direct and substantive issue and the former is an ancillary issue and latter the principal issue. The test to decide whether it was directly and substantially in issue or was only collaterally or incidentally in issue was settled as follows:-

> "The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision then it would be resjudicata in a

latter case. (Mulla p.104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Isher Singh. v. Sarwan Singh, AIR 1965 SC 948, Mohd.S.Labbai v. Mohd. Hanifa, AIR 1965 SC 1559 (sic). We are of the view that the above summary in Mulla is a correct statement of the law.

We have here to advert to another principle of caution referred to by Mulla (p.105). "It is not to be assumed that matters in respect of which issues

> have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."

Considering the conflict in the view in Sulochana Amma's case (supra) and the decision of High Court

of Madras in **Somasundareswarar Temple v. Rajanga (AIR 1965 Madras 355)** it was held:-

> "These two decisions in our opinion cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this court, it is to be assumed that the tests above referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary and in the latter

case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction. In this context, we may refer to Corpus Juris Secundum (vol.50 para 735 page 229) where a similar aspect in respect to findings on possession and incidental findings on title were dealt with. It is stated:

> "Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title."

In **Annaimuthu Thevar v. Alagammal (2005) 6 SCC 202)** it was held that the former suit in which decree for permanent prohibitory injunction was sought was clearly founded on the claim ofr Muthuswami as the owner of the suit house to execute a mortgage and the issue of ownership or title of the house

was thus directly and substantially involved in the former suit. Following Sulochana's case (supra) it was held:-

> "On the examination of the case pleaded by the parties in the former suit and the judgment rendered therein we find that the plea of ownership to the suit house was substantially involved for seeking relief of permanent injunction. Undoubtedly, such plea of ownership could and ought to have been raised in the former suit. Therefore this subsequent suit filed by the present appellant as purchaser from Muthuswami is barred by the doctrine of constructive res

judicata and the High Court was right in holding accordingly. See the following observations of this Court in the case of Sulochana Amma v. Narayanan Nair (SCC p.20) para 9).

"It was contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue

directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as re judicata."

11. The facts of this case establish that in the former suit appellant sought a decree for injunction based on the same set of facts. Possession was based on the same lease set up in the suit. Hence in the former suit question of title raised and decided was directly and substantially an issue which was necessarily to be decided. Hence in Ext.A1 and A3 judgments were necessary to decide the question whether plaintiffs therein were the tenants under the

lease set up as possession was barred on the lease. It was a substantial and direct issue involved. Therefore the finding on title in Ext.A1 and A3 would operate as bar of res judicata in the present suit. As rightly found by the courts below though former suits were one for injunction, possession was set up on the strength of lease which is the title set up in the present suit. The question of title was a substantial issue necessary for a decision in the former suit. The predecessor in interest of appellants invited a decision on the question of title by paying court fee under section 27(a) of Court Fees and Suit Valuation Act. If the predecessor in interest of the appellants did not want a decision on the question of title, atleast after framing of the issue on title steps to delete that issue should have been taken. He did not do so. Evidence was let in on the title. Question of title was also decided. As evidenced by Exts.A1 and A3 judgments, the decision on title

against the predecessor in interest of the appellants in the former suit definitely operate as bar of res judicata in the present suit. Courts below on the facts and evidence were justified in holding that present suit is barred by res judicata in view of Ext.A1 judgment as confirmed in Ext.A3 judgment. In view of that finding, question of tenancy was not to be referred to the Land Tribunal. As rightly found by first appellate court, appellants have no title to the property and are not entitled to the decree sought for.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO. 783 /1994

JUDGMENT

10TH DECEMBER,2007